

FILED

NOT FOR PUBLICATION

JUL 26 2006

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL MARTINEZ,

Defendant - Appellant.

No. 04-50027

D.C. No. CR-02-00509-GHK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Submitted July 24, 2006**

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Samuel Martinez appeals from his guilty-plea conviction and the 77-month sentence imposed for being an illegal alien found in the United States after deportation, in violation of 8 U.S.C. § 1326(a).

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), counsel for Martinez

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

has filed a brief stating there are no grounds for relief, and a motion to withdraw as counsel of record. Martinez has filed a pro se supplemental brief, and the government has filed an answering brief.

We have reviewed the briefs and conducted an independent review of the record pursuant to *Penon v. Ohio*, 488 U.S. 75, 83 (1988). We affirm the conviction. Because appellant was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). See *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional error).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we also remand the case to the district court with instructions that it delete from the judgment the incorrect reference to § 1326(b)(2). See *United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)).

Counsel's motion to withdraw on appeal is **DENIED** without prejudice to

renewing the motion in the district court. All other pending motions are
DENIED.

The conviction is **AFFIRMED.**

The sentence is **REMANDED.**